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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE,

Plaintiff and Respondent,

v.

JACK LOYD MECUM,

Defendant and Appellant.

C058380

(Super. Ct. No. 62051375)

Defendant, Jack Loyd Mecum, appeals his three strikes state prison sentence of 28 years to life. Defendant entered a no contest plea to felony driving under the influence of drugs or alcohol with three or more priors within 10 years (Veh. Code, §§ 23152, subd. (a), 23550; count one), felony driving while having a 0.08 percent or higher blood-alcohol content with three or more priors within 10 years (Veh. Code, §§ 23152, subd. (b), 23550; count two), three misdemeanors for driving on a suspended license (Veh. Code, §§ 14601.2, subd. (a), 14601.1, subd. (a), 14601.5, subd. (a); counts three, four, and five), and an

infraction for driving without evidence of financial responsibility (Veh. Code, § 16028, subd. (a); count six). Defendant admitted three prior driving under the influence convictions (1999, 2002, 2004) within 10 years of his current driving under the influence offenses (Veh. Code, § 23550). In connection with counts three, four and five, defendant admitted that he had been convicted of prior violations within five years of the current offenses. Defendant also admitted three strike priors (1977, assault with a deadly weapon; 1987, armed robbery; 1987, assault with a deadly weapon) (Pen. Code, §§ 667, subds. (b)-(i), 1170.12) and three prior prison term allegations (Pen. Code, § 667.5, subd. (b)). In entering his plea, no promises, offers, or deals were made; the parties understood that defendant planned to file a request to strike the strike priors.

After denying defendant's motion pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*) and his motion to withdraw his plea, the court sentenced defendant to state prison as follows: count two, an indeterminate term of 25 years to life; count one, the same sentence but stayed pursuant to Penal Code section 654; counts three, four and five, a concurrent six-month county jail term each; and one year for each of the three prior prison terms.

Defendant appeals, contending (1) the court abused its discretion and violated his right to due process in denying his *Romero* motion, and (2) the 25-years-to-life sentence constitutes cruel and unusual punishment under the state and federal

Constitutions. We will reject defendant's contentions and affirm the judgment.

FACTS

In April 2005, defendant was driving a pickup truck at 10 miles per hour on the freeway and impeding traffic. He voluntarily pulled over to the shoulder followed by a California Highway Patrol officer who, upon contact, observed that defendant was intoxicated. A preliminary alcohol screening test revealed defendant's alcohol content was 0.18 percent. A blood test later revealed an alcohol content of 0.19 percent.

DISCUSSION

I.

Defendant contends the trial court abused its discretion in refusing to strike one or all of his strike priors, arguing: the current offense involved no violence and no victim; the current offense was dissimilar to his strike priors which involved victims and violence; the strike priors are remote; and his record reflects a "decrease, not an increase, in the level of the seriousness of the crimes committed." He claims the court did not seem to consider mitigating factors, including "the support of his family, the prospect of employment and his commitment to sobriety."

A trial court has the discretion to strike a strike prior only if the defendant falls outside the spirit of the three strikes law. (Pen. Code, § 1385; *People v. Williams* (1998) 17 Cal.4th 148, 161 (*Williams*); *Romero, supra*, 13 Cal.4th at pp. 529-531.) In determining whether to strike a strike prior,

the trial court "must consider whether, in light of the nature and circumstances of his present felonies and prior serious and/or violent felony convictions, and the particulars of his background, character, and prospects, the defendant may be deemed outside the scheme's spirit, in whole or in part, and hence should be treated as though he had not previously been convicted of one or more serious and/or violent felonies." (*Williams, supra*, 17 Cal.4th at p. 161.)

The trial court's "failure to . . . strike a prior conviction allegation is subject to review under the deferential abuse of discretion standard." (*People v. Carmony* (2004) 33 Cal.4th 367, 374.) In reviewing the trial court's ruling for abuse of discretion, "we are guided by two fundamental precepts. First, "[t]he burden is on the party attacking the sentence to clearly show that the sentencing decision was irrational or arbitrary. [Citation.] In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review." [Citations.] Second, a "decision will not be reversed merely because reasonable people might disagree. 'An appellate tribunal is neither authorized nor warranted in substituting its judgment for the judgment of the trial judge.'" [Citations.] Taken together, these precepts establish that a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could agree with it." (*Id.* at pp. 376-377.) We find no such abuse of discretion here.

Defendant's life of crime as an adult began when he was 18 years of age.¹ Between 1969 and 2005, defendant was convicted of approximately 12 misdemeanors and 8 felonies; had his parole violated 6 times; and his driver's license suspended 7 times. At the time of the current offenses, defendant was on probation for a misdemeanor offense.

¹ In 1969, he was convicted of tampering with a vehicle, a misdemeanor, and granted probation. He then sustained the following convictions: 1970, illegal speed contest (six days jail); 1972, disturbing the peace (five days jail); 1973, accessory, a misdemeanor (probation then after revocation, five days jail); 1974, receiving stolen property, a felony (probation with 60 days jail); 1976, driving under the influence, a misdemeanor (probation with two days jail); 1976, exhibiting a deadly weapon/firearm, a misdemeanor (probation with 30 days jail); 1977, assault with a deadly weapon, a felony (state prison); 1983, obstructing/resisting a public officer, a misdemeanor (probation with 10 days jail); 1985, exhibiting a deadly weapon/firearm, a misdemeanor (probation with 45 days jail); 1987, assault with a deadly weapon, a felony (three years state prison); 1987, robbery, a felony (two years state prison concurrent with previous assault with a deadly weapon offense); 1989 and 1992, parole violations (returned to prison each time to finish term); 1997, infliction of corporal injury on a spouse/cohabitant, a felony (two years state prison); 1998, 1999, 2000, 2001, parole violations (returned to prison each time to finish term); 2002, driving under the influence of alcohol/drugs/0.08 percent, a misdemeanor (probation with 15 days jail); 2004, driving under the influence, a misdemeanor (probation with 120 days jail), and driving on a suspended license, a misdemeanor (probation with 30 days jail).

The probation report reflects defendant's recent convictions for driving under the influence (August 1999, August 2002, and March 2004) and for driving on a suspended license. Defendant's license was suspended in March 2000 for driving under the influence, March 2002 for excessive blood-alcohol level, August 2002 for driving under the influence, April 2003 for "neg[ligent] op[er]ator proof req[ui]red," February 2004 for excessive blood-alcohol level, March 2004 for driving under the influence, and May 2005 for excessive blood-alcohol level.

At the hearing on defendant's request to strike the strike priors, defense counsel argued that the current offense involved "no bad driving and there was no victim." With respect to defendant's criminal history, defense counsel claimed that defendant's last felony conviction was in 1997 and it involved minimal injury to the victim and, at that time, the trial court struck the strike priors. Defense counsel claimed that the last time defendant had been offered any kind of alcohol rehabilitation program was in 1974. In support of the argument that defendant's conduct and convictions reflect "no increasing seriousness," defense counsel noted that defendant's 1977 strike prior was 30 years old, his 1987 strike priors were 20 years old, and that his last prison term was for a felony 10 years old. Defense counsel stated that defendant had positive prospects for future employment with the Iron Workers' Union, having been previously employed as an iron worker (from 1980 to 1986, from 1988 to 1995, from 1996 to 1998 and from 2000 to 2004), and had positive support from his family. Since defendant's most recent custody in 2005, defense counsel claimed that defendant had "taken an active part every week in the Scared Straight program."

The prosecutor responded to several points raised by defense counsel beginning with the claim that defendant's convictions and conduct had not increased in seriousness. The prosecutor argued that defendant's driving under the influence alone showed that his convictions and conduct had increased in seriousness, noting that his priors were misdemeanors and he had

been on probation when he committed the current felony offense. The prosecutor also noted defendant's numerous felony and misdemeanor convictions, his prior prison terms and his strike priors. Although the current offense involved no victim, the prosecutor pointed out that "we were lucky this time," in view of defendant's blood-alcohol content of 0.19 percent and his plan to drive from Sacramento to Reno. The prosecutor also disputed the degree of injury to the victim of the spousal/cohabitant abuse in 1997. The prosecutor claimed that there was "a pattern of abuse that culminated in one final fight" that led to defendant's conviction.² With respect to lack of an offer of an alcohol rehabilitation program, implying it

² When defendant entered his plea in 1997 to the corporal injury offense, the prosecutor set forth the following factual basis: "[O]n September 1st of 1996, in Sacramento County, [the victim] was living at her daughter's apartment. She had fled from the jurisdiction of Nevada to get away from her husband of 27 years. [¶] There had been a prior incident in Nevada where the Defendant had choked her and caused a small cut with a butcher knife on her abdomen. [¶] After that, there was another incident [o]n . . . June 22nd where he hit her in the face while driving in a car. . . . [¶] That caused her to leave and she came to Sacramento. She lived with her daughter. [¶] Approximately a month later, the Defendant arrived in Sacramento and was living in motels on Auburn Boulevard and eventually ran out of funds and moved in with the same daughter. That put them into contact again. [¶] Then on September 1st, the Defendant began drinking, and [the victim] tells me when the Defendant drinks, he becomes violent. [¶] They got in an argument The Defendant struck [the victim] in the face. He grabbed her hand when she moved her hand to block a blow, and somehow hurt her finger, hurt her middle finger, and shoved her against the wall, which caused a bruise on her hip and also caused a strain to her finger." Defense counsel had no comment on the factual basis set forth by the prosecutor.

was someone else's burden to solve the defendant's alcohol problem, the prosecutor noted that defendant had the opportunity to take advantage of the same when out of custody. With respect to the issue of remoteness of the strike priors, the prosecutor argued that the same were old "if you look at the calendar," but not remote because the convictions were not separated by periods of time when defendant rehabilitated himself and instead were filled with continued violations of the law and parole violations. The prosecutor suggested that defendant's employment history was "insignificant" since it has had no positive impact and defendant had "maintained the same relentless recidivism of criminal conduct." The prosecutor stated the facts underlying the strike priors were "horrific" and that defendant was given a last opportunity to rehabilitate himself when he was admonished by the court at the sentencing hearing in 1997.³

³ The People argued that the facts underlying defendant's strike priors "constitute the most compelling reason to deny the defendant's motion to dismiss the strikes." The prosecutor recounted the underlying facts of defendant's 1977 conviction for assault with a deadly weapon as follows:

"[T]he victim was stuck at a gas station because his car would not start. The defendant drove into the station and agreed to help the victim jumpstart his car in exchange for money. After they got the victim's car started, the victim realized he had no cash after paying for his gas. The defendant became enraged and pulled out a hunting knife and slashed at the victim. As the victim was running away, he was stabbed by the defendant several times in his 'trunk and leg.' Defendant chased after the victim who continued running across the street. The defendant then went back to the gas station and jumped on the hood of the victim's car and broke the windshield by kicking it. Then the defendant got into his own car and sped off. The

victim suffered multiple stab wounds, some being 'quite extensive,' and reportedly lost a great deal of blood, but survived his injuries."

The prosecutor recounted the underlying facts for defendant's 1987 assault with a deadly weapon conviction as follows:

"[O]n [or] about May 26, 1986, the defendant and two companions went to the victim's home to collect on a \$200.00 debt. At home at the time was the victim, his wife and their child. Despite being asked not to enter the home by the victim and his wife, defendant entered the home and told the victim that if the debt was not paid he would be taking the victim's vehicle as payment. When the victim refused, the defendant pulled out a sawed-off shotgun and began waving it and pointing it at the victim, yelling at him that he was 'going to take you out.' At this point, the victim's young son fled from the house, prompting one of the defendant's companions to go out and bring him back to the home. The victim's wife ran out after them. A struggle ensued between the victim and the defendant over the sawed-off shotgun, but when the young boy was returned to the home the victim stopped struggling. The victim then offered a roll of carpet to the three men to get them to leave. The defendant demanded the victim take it out to the car for him. When the victim refused, the defendant, with the shotgun in one hand, punched the victim in the jaw with his other hand and the three men left the home with the carpet."

The prosecutor recounted the underlying facts for defendant's 1987 armed robbery conviction as follows:

"[O]n June 11, 1986, the victim went to a neighbor's home to ask if he could haul any garbage for him. While the two were talking, the defendant and a companion entered the room, grabbed the victim and forced him to sit on the floor. While holding him down, the defendant held a knife against the victim's neck and rubbed the blade through the victim's hair. The defendant took a purse or bag from the victim and the other subject took the victim's watch off his wrist. The defendant and his companion asked [the] victim where he kept his money, prompting the victim to point to the purse. The money (\$82.00) and some jewelry were taken from the purse and divided between defendant and his companion. At that time the defendant and his companion had a conversation. The defendant's companion then left the house and returned a few moments later with a syringe of battery acid. The defendant told the owner of the residence that he (the defendant) intended to inject the victim with the battery acid in the syringe. That prompted an argument between the

Defense counsel asserted the injury to the victim in 1997 was minimal and that it was defendant's last felony conviction. Defense counsel claimed that alcohol had "destroyed" defendant's life.

In denying the motion to strike any of the strike priors, the court stated that it had considered the facts underlying the current offense ("just flat dangerous") and defendant's criminal history which began in 1969, "continu[ing] through now with not much of a break anywhere." The court stated that it had considered all of the information, "both on the good side and the bad side." The court concluded that defendant had the opportunity to resolve his alcohol dependency in that rehabilitation programs were available and had received a "serious break in 1997" but failed to take advantage. The court confirmed the prosecutor's label of "relentless recidivism."

(RT 26) The court concluded that defendant did not fall outside the spirit of the three strikes law, "notwithstanding the mitigation that counsel argues, some of which I accept, much of which I do not." Defense counsel voiced no objection to the court's statement of reasons for denying the motion.

The trial court did not abuse its discretion in denying the motion. The trial court recognized its authority to strike one or more of defendant's strike priors, considered defendant's overall record, as well as defense counsel's claims of

defendant and the home-owner, which gave the victim the opportunity to jump through a window and escape."

mitigation, and concluded that defendant continued his life of crime unabated and was not outside the spirit of the three strikes law. The record supports the trial court's conclusion. Defendant has simply failed to meet his burden of clearly showing that the sentence was irrational or arbitrary.

II.

Defendant contends his sentence of 25 years to life on count two violated his federal and state constitutional guarantees against cruel and unusual punishment. We disagree.

"[S]ociety's interest in deterring criminal conduct or punishing criminals is not always determined by the presence or absence of violence. [Citations.]" (*People v. Cooper* (1996) 43 Cal.App.4th 815, 826 (*Cooper*).) "Under the three strikes law, defendants are punished not just for their current offense but for their recidivism. Recidivism in the commission of multiple felonies poses a danger to society justifying the imposition of longer sentences for subsequent offenses." (*Id.* at pp. 823-824, citing *Rummell v. Estelle* (1980) 445 U.S. 263, 284 [63 L.Ed.2d 382, 397].) "California statutes imposing more severe punishment on habitual criminals have long withstood constitutional challenge." (*People v. Cartwright* (1995) 39 Cal.App.4th 1123, 1136-1137; accord, *Cooper, supra*, at pp. 820, 825-828 [25 years to life for a third-strike offender convicted of being a convicted felon in possession of a firearm was not disproportionate].)

"[I]n California a punishment may violate [California Constitution, article I, section 17] if, although not cruel or

unusual in its method, it is so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted (*Lynch*).) To determine whether a sentence is cruel and unusual, we (1) examine the nature of the offense and the offender, (2) compare the sentence with punishments for more serious offenses in the same jurisdiction, and (3) compare the sentence with punishments for the same offense in other jurisdictions. (*Id.* at pp. 425-427.)

"In examining 'the nature of the offense and the offender,' we must consider not only the offense as defined by the Legislature but also 'the facts of the crime in question' (including its motive, its manner of commission, the extent of the defendant's involvement, and the consequences of his acts); we must also consider the defendant's individual culpability in light of his age, prior criminality, personal characteristics, and state of mind. [Citations.]" (*People v. Crooks* (1997) 55 Cal.App.4th 797, 806.)

Defendant compares his three strike sentence to the three strike sentences imposed in *People v. Carmony* (2005) 127 Cal.App.4th 1066, 1073, 1089 [current offense of failure to provide duplicate sex registration], *Ramirez v. Castro* (9th Cir. 2004) 365 F.3d 755, 756 [current offense of petty theft with a prior shoplifting], *Reyes v. Brown* (9th Cir. 2005) 399 F.3d 964, 965-966 [current offense of perjury on a driver's license application], and *Banyard v. Duncan* (C.D. Cal. 2004) 342 F.Supp.2d 865, 867, 883 [current offense of possession of a

fraction of a gram of rock cocaine considered "trivial"]. All the foregoing cases are distinguishable on their facts, those related to the offenses, offender and the offender's criminal history. Moreover, in *Reyes v. Brown, supra*, at page 969, the court did not find that the punishment was cruel and unusual but instead, concluded that the record was insufficient to determine whether the defendant's prior robbery conviction was a violent crime or a crime against a person. And in *People v. Carmony, supra*, at page 1079, the court determined that the failure to provide duplicate registration was similar to overtime parking and harmless.

Here, defendant is a 58-year-old man who has committed offenses since he was 18 years of age. We need not recount his criminal history again. Suffice it to say that he has committed numerous offenses, including serious and violent ones. He has been to prison yet he continues to commit crimes. Defendant's prior convictions for armed robbery in 1987 and two convictions for assault with a deadly weapon, in 1977 and again in 1987, are violent/serious offenses. Defendant went to prison for these offenses. Defendant also went to prison for his 1997 corporal injury offense. While defendant's current convictions for drunk driving are not listed as violent or serious offenses in Penal Code sections 667.5, subdivision (c) and 1192.7, they are no less serious than his priors in the sense that by going 10 miles per hour on the freeway while very drunk, he endangered others, contrary to defendant's claim otherwise.

Defendant makes no claims or assertions with respect to the second and third areas of focus under *Lynch*, that is, he does not otherwise compare his sentence with punishments for more serious offenses committed in California (*Lynch, supra*, 8 Cal.3d at p. 426) or compare his sentence with punishments for the same offenses in other jurisdictions. (*Id.* at p. 427.)

We find nothing noteworthy about the offenses or defendant that would lead to the conclusion that defendant's sentence is grossly disproportionate to the crimes. Defendant's sentence does not shock the conscience nor is it disproportionate under California law. (*Lynch, supra*, 8 Cal.3d at p. 424.) With respect to defendant's claim based on federal law, we can say the same. "The Eighth Amendment [to the United States Constitution], which forbids cruel and unusual punishments, contains a 'narrow proportionality principle' that 'applies to noncapital sentences.'" (*Ewing v. California* (2003) 538 U.S. 11, 20 [155 L.Ed.2d 108, 117] (*Ewing*), quoting *Harmelin v. Michigan* (1991) 501 U.S. 957, 996-997 [115 L.Ed.2d 836, 866] (*Harmelin*).) "[T]he 'precise contours' of the proportionality principle 'are unclear'" and the principle is "applicable only in the 'exceedingly rare' and 'extreme' case." (*Lockyer v. Andrade* (2003) 538 U.S. 63, 72-73 [155 L.Ed.2d 144, 156].)

Ewing's application of the Eighth Amendment followed the proportionality principles identified in the concurring opinion of Justice Kennedy in *Harmelin*: "'the primacy of the legislature, the variety of legitimate penological schemes, the nature of our federal system, and the requirement that

proportionality review be guided by objective factors' -- that 'inform the final one: The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are "grossly disproportionate" to the crime.'" (*Ewing, supra*, 538 U.S. at p. 23 [155 L.Ed.2d at p. 119], quoting *Harmelin, supra*, 501 U.S. at p. 1001 [115 L.Ed.2d at p. 869], (conc. opn. of Kennedy, J.).)

Here, defendant's sentence is not grossly disproportionate to the crimes and enhancements for which he is being punished. Thus, his Eighth Amendment claim fails.

III.

Although not raised by the parties, we have discovered an error regarding the prior prison term enhancements. (Pen. Code, § 667.5, subd. (b).)

The amended information alleged that defendant had served separate prison terms for three prior felony convictions as follows:

"05-08-87 Armed Robbery (211/12022 PC) Sacramento/77810

"05-08-87 Assault with Deadly Weapon (245 PC) [" /76630

"04-15-97 Corporal Injury [] (273.5 PC) [" /96F06994"

Defendant entered a plea to the sheet, that is, all the charges and allegations in the amended information. This was not a plea bargain. There was no stipulated sentence or sentencing lid. The only understanding was that the judge would consider defendant's motion to strike the strike priors pursuant

to *Romero*. The court imposed a one-year term for each of the three prior prison term allegations defendant had admitted.

The probation report reflects that defendant served a separate prison term in 1997 for the corporal injury offense. But the probation report reflects that defendant served only one, not two, prison terms for the 1987 offenses. In 1987 defendant received a two-year prison term for the armed robbery offense in case No. 77810 to be served concurrently to the three-year prison term imposed for the assault with a deadly weapon offense in case No. 76630.

"Courts have consistently recognized that . . . only one [prior prison term] enhancement [pursuant to Penal Code section 667.5, subdivision (b)] is proper where concurrent sentences have been imposed in two or more prior felony cases." (*People v. Jones* (1998) 63 Cal.App.4th 744, 747; Pen. Code, § 667.5, subd. (g).) This is so because to support the prior prison term enhancement, the term must have been a "separate prison term." (Pen. Code, § 667.5, subd. (b); *People v. Langston* (2004) 33 Cal.4th 1237, 1241 ["to qualify for the enhancement, the prior prison terms must have been served separately"].) Therefore, because the prison terms imposed for the two 1987 convictions alleged in the amended information were imposed and served at the same time, there was only one prior prison term within the meaning of the Penal Code section 667.5, subdivision (b) statute. We shall modify the judgment by striking the prior prison term enhancement imposed for the armed robbery offense

which was served concurrently to the assault with a deadly weapon offense.

DISPOSITION

The trial court is directed to prepare an amended abstract of judgment, deleting reference to the 1987 armed robbery prior prison term enhancement, thus reflecting that one-year terms were imposed for only two prior prison term enhancements, and to forward a certified copy of the amended abstract to the Department of Corrections and Rehabilitation. As modified, the judgment is affirmed.

CANTIL-SAKAUYE, J.

We concur:

NICHOLSON, Acting P. J.

RAYE, J.